Chang et al v. Virgin Mobile USA LLC et al Doc. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG,	§	
PLAINTIFFS,	§	
VS.	§	**NO. 3:07-CV-01767**
VIRGIN MOBILE USA, LLC, VIRGIN MOBILE PTY, LTD., AND CREATIVE COMMONS CORPORATION,	§	
DEFENDANTS.	§	

CREATIVE COMMONS CORPORATION'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Pursuant to *Fed. R. Civ. P.* 12(b)(2) and (6) Creative Commons Corporation ("Creative Commons") respectfully moves to dismiss the sole claim made against it for (1) lack of personal jurisdiction; and (2) failure to state a claim upon which relief can be granted.

OPERATIVE FACTS

A. NATURE OF THE CASE:

This is a lawsuit by the mother (as next friend) of her teenage daughter (Chang), age 16, and by a photographer (Wong) who took the teenager's photograph at a church social event[1] and posted it on an Internet photo-sharing Web site known as Flickr.[2]

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[1] Wong describes himself in the *Petition* as the girl's "youth counselor." *Petition*, ¶13.

[2] *See* http://www.flickr.com/

Dockets.Justia.com

B. CHANG'S CLAIMS AGAINST THE VIRGIN MOBILE DEFENDANTS:

Chang claims Virgin Mobile USA, LLC ("VM USA")[3] and Virgin Mobile PTY, Ltd. ("VM Australia") misappropriated the photograph by downloading it from Flickr incorporating it into an advertising campaign for cellular telephone service[4] and did so in a manner which Chang claims disparaged her.[5] Chang alleges the actions of the Virgin Mobile defendants constitute (1) invasion of Chang's privacy;[6] (2) libel *per se*;[7] and (3) libel *per quad*.[8] ***Chang has not pleaded any claims against Creative Commons***.

C. THE PHOTOGRAPHER'S CLAIMS:

Creative Commons is a non-profit corporation which seeks to facilitate the sharing of scientific, creative, and intellectual works within and among the general public through such means as making available to the public free of charge various licensing agreements.[9] The photographer, Wong, claims he posted Chang's photograph on Flickr subject to one of these licenses, *i.e.*, an "attribution license," which required users of the photograph to credit Wong for his "creation." *See Petition*, ¶¶11 and 12. Wong alleges the Virgin Mobile defendants entered into a binding licensing contract with him when they allegedly downloaded Chang's photograph from Flickr and claims they violated the licensing agreement by using the photograph in the advertising campaign "without properly attributing [*sic*] the photographer and licensor, Justin Wong." *Petition*, Count IV, p. 8.[10]

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[3] As reflected in its *Notice of Removal* filed in this case, Virgin Mobile USA, L.P., is the successor to Virgin Mobile USA, LLC.

[4] *See* "Dump Your Pen Friend" http://www.flickr.com/photo_exif.gne?id=515961023

[5] Chang claims advertising slogans superimposed over the photograph were defamatory.

[6] *Petition*, Count I.

[7] *Petition*, Count II.

[8] *Petition*, Count III.

[9] *See* http://creativecommons.org/about/license/

Wong claims Creative Commons was "negligent" by:

> failing, among other things, to adequately educate and warn him, as a user of the Creative Commons Attribution license, of the meaning of commercial use and the ramifications and effects of entering into a license without such use.[11]

He summarily claims he suffered damage from his allegedly "inadequate education," but fails to specify in what manner or amount.

Wong's "negligence" claim is the only cause of action alleged by either plaintiff against Creative Commons.

Other facts necessary to disposition of the motion are incorporated in the *Argument*, below, where appropriate.

I.

AS A MATTER OF LAW, PERSONAL JURISDICTION IS LACKING OVER CREATIVE COMMONS.

A. APPLICABLE LAW—MINIMUM CONTACTS NECESSARY:

Sitting in diversity, this Court may only exercise jurisdiction over a foreign corporation to the same extent as would Texas courts under the Texas long arm statute. *See Mark Trucks, Inc. v. Arrow Aluminum Castings Co.*, 510 F.2nde 1029, 1031 (5th Cir. 1975); CIV. PRAC. & REM. CODE §17.042. Consequently, jurisdiction may be exercised over Creative Commons only if (1) the exercise of jurisdiction is authorized by the Texas long-arm statute; and (2) if so, if the exercise of jurisdiction comports with due process. *E.g., Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 103-111 (1987); *Dalton v. R & W Marine, Inc.*, 897 F.2nd 1359, 1361 (5th Cir. 1993); *G&H Partners v. Boer Goats Intern.*, 896 F.Supp. 660, 663 (W.D. Tex. 1995); *Schlobohm v. Schapiro*, 784 S.W.2nd 355, 356 (Tex. 1990); FED. R. CIV. P. TEX. 4; CIV. PRAC. & REM. CODE §17.042.

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[10] Creative Commons disagrees with Wong's contention that use of its license created any contract between Wong and Virgin Mobile or any other user of materials posted by Wong to Flickr. However, resolution of that issue is immaterial to disposition of Creative Commons' motion to dismiss.

[11] *Petition*, Count V, p. 8

Because the Texas long-arm statute is construed to reach as broadly as due process permits, *e.g., Docutel Corp. v. S.A. Matra*, 464 F.Supp. 1209, 1217 (N.D. Tex. 1979); *U-Anchor Adver. Inc. v. Burt*, 553 S.W.2nd 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978), the two issues merge into a single due process inquiry. *E.g., Ham v. La Cienega Music Co.*, 4 F.3rd 413 (5th Cir. 1993).

The due process question is, in turn, itself a two-part inquiry. First, the Court must determine whether the defendant has engaged in "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Villar*, 990 F.2nd at 1496, *citing International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Second, "[e]ven where such 'minimum contacts' exist, we also inquire whether requiring a defendant to litigate in the forum state would be unfair." *Dalton v. R&W Marine, Inc.*, 897 F.2nd 1359, 1361 (5th Cir. 1990). The burden is on plaintiff to make a *prima facie* showing of personal jurisdiction. *E.g., Rittenhouse v. Mabry*, 832 F.2nd 1380, 1382 (5th Cir. 1987); *G&H Partners*, 896 F.Supp. at 665.

B. "SPECIFIC" VS. "GENERAL" JURISDICTION:

"The minimum contacts the Constitution requires depend on whether the court is asserting specific or general jurisdiction over the defendant." *Villar*, 990 F.2nd at 1496. When a cause of action arises out of a defendant's purposeful contacts with the forum state, the jurisdiction is "specific." *E.g.*, *Dalton*, 897 F.2nd at 1361; *Conner v. ContiCarriers and Terminals, Inc.*, 944 S.W.2nd 405, 410 (Tex. App.—Houston [14th Dist.] 1997, *no writ*). "For specific jurisdiction, the defendant must have purposely directed his activities at the resident of the forum and, the litigation must result from the alleged injuries that arise out of or relate to the defendant's activities directed at the forum." *Coats v. Penrod Drilling Corp.*, 5 F.3rd 877, 884 (5th Cir. 1993); *accord ContiCarriers*, 944 S.W.2nd at 410. "The focus is on the relationship between the defendant, the forum, and the litigation." *Coats*, 5 F.3rd at 884.

"Where a cause of action does not arise out of a foreign defendant's purposeful contacts with the forum, however, due process requires that the defendant have engaged in 'continuous and systematic contacts' in the forum to support the exercise of 'general' jurisdiction." *Dalton*, 897 F.2nd at 1361-62, *citing Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). Because general jurisdiction involves the exercise of jurisdiction over a claim unrelated to the defendant's contacts with the forum, "contacts of a more extensive quality and nature are required." *Dalton*, 897 F.2nd at 1362.

C. Plaintiff's Claim Against Creative Commons Depends On General Jurisdiction, And As A Matter Of Law Personal Jurisdiction Is Lacking:

Creative Commons, a non-profit corporation, conducts no business in Texas. It has no facilities nor any employees located in Texas. Accordingly, the sole negligence claim alleged in this case does not arise out of any purposeful contact of Creative Commons with the State of Texas. *No* contractual or any other relation ship exists—or is alleged to exist—between Creative Commons and either plaintiff. Jurisdiction is predicated *solely* on the existence the fact Creative Commons' passive, informational Internet Web site is accessible from Texas—as it is from anywhere else in the world. As a matter of law, the mere fact a passive Internet Web site is accessible from Texas is insufficient to support jurisdiction. *E.g.*, *Carpenter v. Exelon Corp.*, ___ S.W.3rd ___, 2007 WL 3071998 (Tex. App.—Houston [14th] Oct. 23, 2007, *n.p.h.*); *Weldon Francke v. Fisher*, 2007 WL 2592990 (Tex. App.—Houston [14th] Sept. 11, 2007, *n.p.h.*).

D. REQUIRING CREATIVE COMMONS TO LITIGATE IN TEXAS WOULD BE CONSTITUTIONALLY UNFAIR:

Even assuming, *arguendo*, sufficient contacts with Texas to meet the first part of the due process analysis, the Court must "also inquire whether requiring a defendant to litigate in the forum state would be unfair." *Dalton*, 897 F.2nd at 1361. In this case, requiring Creative Commons to litigate in Texas would offend traditional notions of fair play and substantial justice.

Plaintiff judicially admits Creative Commons is a Massachusetts non-profit corporation with its principal place of business in Massachusetts, *Petition*, ¶5. Creative Common's employees and records are located in California. Accordingly, forcing Creative Commons—a non-profit corporation—to incur the expense and inconvenience of litigating Wong's claim in Texas would not comport with due process.

II.

AS A MATTER OF LAW, COUNT V OF THE *PETITION* FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED:

A. APPLICABLE LAW—FED. R. CIV. P. 12(B)(6) MOTIONS:

The Fifth Circuit recently succinctly stated the standards for evaluating a Rule 12(b)(6) motion in light of the Supreme Court's decision in *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2nd 929 (2007). *See Cuvillier v. Taylor*, ___ F.3rd ___, 2007 WL 2892970 (5th Cir. Oct. 5, 2007) at 2:

> To survive a Rule 12(b)(6) motion to dismiss, a complaint "does not need detailed factual allegations," but must provide the plaintiff's grounds for entitlement to relief-including factual allegations that when assumed to

be true "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2nd 929 (2007).[12] Conversely, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Twombly*, 127 S.Ct. at 1966 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* §1216, at 234) (quoting *Daves v. Hawaiian Dredging Co.*, 114 F.Supp. 643, 645 (D. Ha. 1953) (internal quotation marks omitted)).

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formalistic recitation of the elements of a cause of action will not do." *Twombly*, 127 S.Ct. at 1964-65.

In this case, Wong's allegations are no more than a formalistic recitation of the elements of negligence and are insufficient as a matter of law.

B. APPLICABLE LAW—NEGLIGENCE CLAIMS REQUIRE EXISTENCE OF A DUTY:

A cause of action for negligence has three elements under Texas law: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) damages proximately caused by the breach. *E.g.*, *Van Horn v. Chambers*, 970 S.W.2nd 542, 544 (Tex. 1998). "The threshold inquiry in a negligence case is duty." *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2nd 523, 525 (Tex. 1990). The existence of a duty is a question of law for the trial court. *Id.*

C. AS A MATTER OF LAW, WONG'S ALLEGATIONS FAIL TO STATE A CLAIM FOR NEGLIGENCE:

As a matter of law, Count V of the *Petition* fails to allege any basis for imposing any legal duty on Creative Commons. The sole basis claimed by Wong for creation of any "duty" allegedly owed by Creative Commons to Wong is the wholly conclusory, formalistic contention in ¶35 of the *Petition*: "Creative Commons owed a duty to Justin Wong, as a user and beneficiary of its license." As a matter of law, Wong's contention is nothing more than a wholly insufficient "formalistic recitation of the [duty] element[]" of negligence." *Twombly, supra. See also Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2nd 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). In fact, Wong's pleading specifically ***negates*** the existence of any duty.

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[12] In *Twombly*, the Supreme Court disapproved of the long-used test for Rule 12(b)(6) motions, *i.e.*, whether the plaintiff could "prove no set of facts in support of his claim which would entitle him to relief," contained in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2nd 80 (1957), stating "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Id.*

First, the license used by Wong—which the photographer has attached to and incorporated into his pleading (*see Petition*, ¶30)—expressly *disclaims* any duties at the very outset of the document. *See Petition*, Exhibit B (caps original):

> CREATIVE COMMONS CORPORATION IS NOT A LAW FIRM AND DOES NOT PROVIDE LEGAL SERVICES. DISTRIBUTION OF THIS LICENSE DOES NOT CREATE AN ATTORNEY-CLIENT RELATIONSHIP. CREATIVE COMMONS PROVIDES THIS INFORMATION ON AN "AS-IS" BASIS. CREATIVE COMMONS MAKES NO WARRANTIES REGARDING THE INFORMATION PROVIDED, AND DISCLAIMS LIABILITY FOR DAMAGES RESULTING FROM ITS USE.

Second, there is *no* contractual or other relationship whatsoever between Wong and Creative Commons. Indeed, the license expressly *negates* any contractual relationship and expressly excludes all liability. *Id.*, Exhibit B, p.5:

> Creative Commons is not a party to this License, and makes no warranty whatsoever in connection with the Work. Creative Commons will not be liable to You or any party on any legal theory for any damages whatsoever, including without limitation any general, special, incidental or consequential damages arising in connection to this license.

As an attachment to Wong's pleading, the license is a part of the *Petition* for all purposes, *e.g.*, *Fed. R. Civ. P.* 10(c),[13] and Wong is, therefore, judicially bound by its terms. *E.g.*, *Johnson v. Houston's Restaurant, Inc.*, 167 Fed. Appx. 393, 395 (5^{th} Cir. 2006); *White v. ARCO/Polymers, Inc.*, 710 F.2^{nd} 1391, 1396 (5^{th} Cir. 1983) ("Normally, factual assertions in pleadings and pretrial orders are considered to be judicial admissions, conclusively binding on the party who made them."); *Bank One, Texas, N.A. v. Prudential Ins. Co. of America*, 939 F.2^{nd} 533, 541 (N.D. Tex. 1996) (Fitzwater, J.; same).

Plaintiff cannot cite any authority whatsoever to support the proposition Creative Commons had any legal duty to "educate and warn" Wong regarding the "meaning" of the license he chose to use; particularly so, in light of the express disclaimers contained in the document. Taken to its logical conclusion, Wong's conclusory "duty" contention would mean a local public library has a duty to "educate" Wong concerning the meaning of a book he might check out of the library. No such duty exists. To the contrary, under Texas law, Wong had a duty to *read* the license—including the disclaimers—and is conclusively presumed to have knowledge of, and to have consented to, its terms and conditions, including the disclaimers and limitations on liability.

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[13] "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

CONCLUSIONS AND REQUESTED RELIEF

For all of the foregoing reasons, the motion to dismiss should be granted and Creative Commons should be dismissed as a party to this lawsuit.

Respectfully Submitted,

______/s/____________________

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CERTIFICATE OF SERVICE

I certify that one true and correct copy of the foregoing instrument was served on the following lead counsel of record by fax and by first class mail, postage prepaid, this 22nd day of October, 2007:

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